

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1390

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
UNITED STATES OF AMERICA,

Appellee,

- against -

WILSON ARROYO-ANGULO, JAIME RAYO,
HUGO GOMEZ, GUILLERMO MORENO,

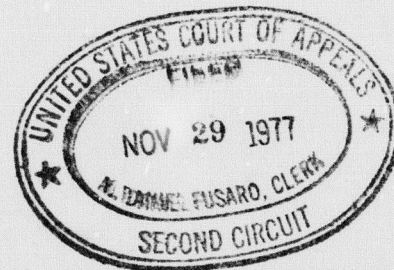
Defendants-Appellants.
-----x

b p/s
77-1390

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

n/29
BRIEF FOR APPELLANT MORENO

CAROL MELLOR, ESQ.
On the Brief



Respectfully submitted,

IRA LEITEL, ESQ.
ATTORNEY AT LAW
188 MONTAGUE STREET
BROOKLYN, NEW YORK 11201
(212) 596-1600

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

- against -

77-1390

WILSON ARROYO-ANGULO, JAIME RAYO,
HUGO GOMEZ, GUILLERMO MORENO,

Defendants-Appellants..
-----X

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
NEW YORK

BRIEF FOR APPELLANT MORENO

Respectfully submitted,

IRA LEITEL
Attorney for GUILLERMO MORENO

Office & P.O. Address
188 Montague Street
Brooklyn, New York 11201
(212) 596 - 1600

CAROL MELLOR, ESQ.
On the Brief

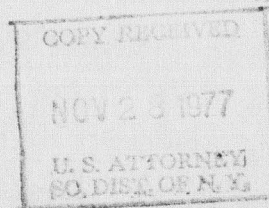


TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
PRELIMINARY STATEMENT.....	1
ISSUES PRESENTED.....	1
FACTS.....	2
ARGUMENT-	
POINT I: THE COURT BELOW ERRED IN REFUSING TO ALLOW DEFENSE COUNSEL AND DEFENDANT TO BE PRESENT DURING CONFERENCES AND HEARINGS HELD DURING TRIAL.....	6
POINT II: PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANT MORENO RESPECTFULLY ADOPTS BY REFERENCE SUCH OF THE POINTS OF HIS CO-APPELLANTS AS ARE APPLICABLE TO HIM.....	19
CONCLUSION.....	19

United States v. Dalli, 424 F.2d 45 (2d Cir. 1970).....	12
--	----

Statutes

Rule 43, Federal Rules of Criminal Procedure.....	11
--	----

TABLE OF AUTHORITIES

Page

Evans v. United States
284 F.2d 393 (6 Cir. 1960).....16

United States v. Bell,
464 F.2d 667 (2d Cir. 1972).....12

United States v. Clark,
475 F.2d 240 (2d Cir. 1973).....,.....12,14,16,19

I

Preliminary Statement

GUILLERMO MORENO appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York, on the 21st day of July, 1977, by Order of THE HONORABLE KEVIN T. DUFFY, U.S.D.J., after a jury verdict of guilty on both counts of a two count indictment. (S77 Cr. 102). Moreno and his co-defendants had been charged and were convicted of violation of Title 21, U.S.C., §846, (conspiracy to violate the narcotics laws) and Title 21, U.S.C.,

§§812, 841(a)(1) and 841(b)(1)(a) and title 18 U.S.C. §2
(possession and possession with intent to distribute narcotics).

II

Issues Presented

Was appellant Moreno denied his rights to confrontation of witnesses and adequate representation by counsel and a public trial by the repeated exclusion of his attorney from conferences and hearings among the Court, the Assistant U.S. Attorney and other counsel and exclusion of appellant Moreno and his attorney from hearings held during trial?

III

Facts

Emelio Rivas, an admitted cocaine dealer, felon and perjurer was the principal witness for the government. He had pleaded guilty and had received a twenty-year sentence; the outcome of a pending motion to reduce sentence depended upon the effectiveness of this testimony against the defendants herein. He testified that in the Fall of 1975, while on a trip to San Francisco with another person to purchase cocaine for re-sale in New York, he met Moreno in a nightclub. Rivas stated that this was the first time he met Moreno, even though they were raised in the same town of Buenaventura in Columbia. He was invited back to Moreno's apartment where he met two of the other co-defendants.

Rivas returned to New York. He owned a two-family house in Brooklyn, in which two women were living, who were Moreno's aunts. Rivas admitted knowing Moreno's aunts from Buenaventura. A short time later, Moreno came to visit his aunts and saw Rivas again. It was at this point, according to Rivas, that Moreno told Rivas that he could supply Rivas

with cocaine. Later that year, in December of 1975, Moreno returned to Brooklyn for another visit with his aunts. Rivas testified that Moreno again, on this second visit, told him that he could supply cocaine.

Rivas stated that he then received a telephone call from Moreno, telling Rivas to come to San Francisco with one of Moreno's aunts since the cocaine was about to arrive. Rivas, upon his arrival in San Francisco, was told that the cocaine had not yet arrived, but that he could stay in another apartment in the building in which Moreno lived.

While waiting for the ship, which supposedly contained the cocaine, to arrive, Rivas met the other co-defendants and was told by Jaime Rayo that he, Rayo and Arroyo-Angulo were free-lance swimmers, and that they swim to boats for different people to bring cocaine to shore.

At another time, and while still waiting for the ship to arrive, Moreno's aunt bought a car, presumably to be used by Moreno. Rivas stayed some 2-3 weeks in San Francisco waiting for the cocaine.

One day, Rivas, Moreno, his aunt and Hugo Gomez

were on a hill overlooking the harbor, and saw that the ship they had been waiting for was in port. They searched for, and eventually found, a seaman from the ship, and made arrangements to pick up the cocaine that night.

That night Rivas drove Rayo and Arroyo-Angulo to the pier, and waited for them to return. They came back to the car with a bundle, which was transported to the apartment in which Rivas had been staying. The bundle was unwrapped, measured and weighed, and Rivas' part was given to him, because he was to return to New York the next day. Rivas was arrested weeks after his alleged return to New York for selling a kilogram of cocaine to an undercover officer in New York.

Upon his arrest, Rivas told the agents for the government that he had obtained the cocaine from a black man named Charlie. The agents, acting upon this information, wired Rivas and Rivas was sent to meet Charlie. The meeting never took place. Rivas pled guilty, and during the allocution on the plea, Rivas told Judge Werker that he had obtained the cocaine from Charlie. It was only after months of incarceration, and a substantial time after he was sentenced, that Rivas changed his story and inculpated the defendants herein.

The other evidence introduced by the government consisted of testimony of agents who had, at various times, including the dates when Rivas was in San Francisco, some or other of the defendants under surveillance. At no time did any of these agents see Rivas and Moreno together; nor was Moreno ever seen near the harbor; nor was Rivas ever seen by any of the surveilling agents with any of the defendants. Nor did the agents ever see Rivas at the harbor, even though Rivas testified that he was in and around the harbor at times when agents were in the area conducting surveillance. The Government also called the manager of the apartment building in which Moreno lived to the stand. He also testified that he had never seen Rivas and Moreno together, nor could he testify to ever having seen Rivas at the building. He did testify that Moreno lived in the building, a fact not contested, and that another apartment in the building was rented by friends of Moreno.

Finally, the Government called a chemist and the new tenants of the apartment in which it claimed Rivas stayed and the cocaine was packaged, to the stand. The chemist testified that months after the packaging was supposed to

have taken place, she vacuumed the apartment and found, in a heater, microscopic traces of cocaine. The tenants testified, under grant of immunity, that they had twice used cocaine, but in other areas of the apartment. All this testimony was later stricken from the record on motion of defense counsel.

Moreno called, as defense witnesses, his cousin and his cousin's wife. They testified that they, too, were raised in Buenaventura, Colombia and that Rivas and Moreno not only lived a few blocks from each other, but had played on the same soccer team when they were younger.

Extensive testimonial and documentary evidence was introduced, against the other defendants, as to prior and subsequent similar acts. There was no such evidence introduced against Moreno.

IV

Argument

POINT I: THE COURT BELOW ERRED IN REFUSING
TO ALLOW DEFENSE COUNSEL AND
DEFENDANT TO BE PRESENT DURING
CONFERENCES AND HEARINGS HELD
DURING TRIAL

Early in the trial of this action, there was an

altercation at the Metropolitan Correctional Center between two of the defendants, which resulted in the calling of a new panel of prospective jurors. Moreno was not involved in the altercation. Thereafter, the Court, ostensibly for reasons of security, directed that certain conferences and hearings be held in camera, without either defense counsel or defendants being present. In addition, the Court ordered sealed the minutes of these proceedings so that even now defense counsel is unaware of what, in fact transpired.

It appears from the record that most of these in camera proceedings were concerned with the issues of admissibility of statements and prior and subsequent similar acts by each of the other defendants. It also appears, judging from the numbers of pages sealed, that some of these proceedings included the taking of testimony.

Moreno's defense counsel, from the outset, objected to this procedure.

Beginning on the morning of June 3, 1977 counsel for Moreno first objected to the private conferences and hearings, and the unavailability to him of transcripts of the entire

proceedings. (T. 695-699). Counsel was, only after confrontation with co-counsel, informed that proceedings had been held concerning the admissibility of statements made by other defendants which mentioned Moreno. A mistrial and severance were requested, and the Court reserved decision because it had not yet ruled upon the admissibility of similar act testimony (T. 700).

On June 6, 1977 a hearing was held with reference to the legality of the arrest of Ahon, a co-defendant whose motion for a judgment of acquittal was granted, and the admissibility of subsequent statements made by Ahon. At this hearing, counsel for other co-defendants were allowed to be present, but the defendants were not. (T. 794). Counsel objected to the non-production of his client, and was told by the Court that "As a matter of security he is not being brought to court." (T.794).

The testimony elicited thereat shows that certainly at this hearing, and presumably at the other hearings to which counsel was not a party, mention was made of Guillermo Moreno. The Drug Enforcement Administration Agent MICHAEL FIORENTINO, testified that he had seen Guillermo Moreno driving a vehicle

registered to one William Pagan, and that his investigation had disclosed that William Pagan was a driver for Guillermo Moreno (T. 809-810). Ahon was seen in the vicinity in which a person had been seen alighting from a car driven by William Pagan.

The attorney for Ahon further developed the relationship between Pagan and Moreno on cross-examination. (T. 825). Counsel for Moreno was not permitted to cross-examine the agent at this hearing.

Agent Fiorentino was an important and major prosecution witness. His testimony provided crucial corroboration to the testimony of Rivas, and thereby cemented and clarified Rivas' testimony. Receipt of testimony of Fiorentino, outside of the presence of Moreno, and, in some instances, outside the presence of Moreno's attorney, greatly prejudiced and hindered the cross-examination of Fiorentino, and, therefore, the defense of Moreno. Unable to confer with the client with reference to the testimony elicited on this particular hearing and, with respect to other hearings, uninformed, to this day of the substance of the testimony, and the witnesses thereat, counsel for Moreno was completely inhibited and prevented

from exploring the credibility and accuracy of Fiorentino's testimony and, presumably, that of other government witnesses.

On the afternoon of June 7, 1977, counsel for Moreno renewed his motion for a severance, based upon the spill-over effects, and the prejudice to Moreno. The Court decided that this motion would be heard at a more appropriate time. (T. 1029). The next morning a long hearing was held; defense counsel for Moreno was precluded from attendance thereat. (T. 1033). This hearing and related proceedings spanned over one hundred pages of transcript. (T. 1036-1151). Moreno's involvement in the incidents described is not known. However, based upon the testimony elicited at the one hearing which counsel for Moreno was allowed to attend, it seems more than probable that similar facts and circumstances of Moreno's involvement were elicited at the other hearings.

Immediately after this extensive hearing, counsel for Moreno again strenuously objected to the course of these proceedings, stating:

"Well, I have the greatest respect for the Court but I am extremely displeased at the proceedings. I complained in the past about the secretive matters and I still complain about them...

...I have never seen this type of secretive proceedings where counsel are excluded repeatedly in the trial and I sincerely protest these repeated proceedings.

"They leave me totally in the dark as to what is happening around me and how this will effect my client and my ability to defend this man."

(T. 1160-1161)

The procedure followed by the Court, ostensibly for reasons of security, resulted in denial to defendant Moreno of his constitutional rights, as guaranteed by the Sixth Amendment to the Constitution, and hampered his defense to such an extent that he is entitled to a new trial.

A defendant in a criminal proceeding has the right to be present during the taking of testimony. The defendant's right to be present, are essential elements of his Sixth Amendment rights to confront witnesses, to have the effective assistance of counsel, and to have a public trial. These rights are embodied in Rule 43 of the Federal Rules of Criminal Procedure, which states:

"The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

Rule 43 F.R.Cr.P.

One of the important reasons for the requirement of a defendant's presence, is to confer with and assist defense counsel in the preparation of the defense and in the cross-examination of witnesses. The absence of this factual input, and opportunity to point out potential inaccuracies to one's counsel have been recognized as resulting in a handicap to defense counsel and thus to the defense. United States v. Clark, 475 F.2d 240 (2d Cir. 1973).

The right of a defendant in a criminal proceeding to be present at the trial, and at hearings conducted before and during trial is not an absolute right; it may be waived by acts or statements of a defendant, United States v. Dalli, 424 F.2d 45 (2d Cir. 1970), and may be denied to a defendant under certain circumstances, for reasons of security. United States v. Bell, 464 F.2d 667 (2d Cir. 1973).

The handicap to the defense at the trial held herein was all the more reprehensible for, in addition to the defendant not being present, defense counsel was excluded. It is therefore, unknown what testimony was elicited that could have been used on cross-examination of the witnesses for the prosecution, or what information or insights into

the Government's case against Moreno could have been utilized to prepare more effective cross-examination and defense of the charges.

As soon as it became apparent to trial counsel that secret or in camera proceedings were taking place, he asked for a mistrial. After the Court ruled that some of the similar acts were admissible, he denied the motion for a mistrial. (T. 1201) The suggested procedure for a mistrial and severance, rejected by the Trial Court, would have not only cured the deprivation and denial to Moreno of his right of confrontation, right to cross-examination and right to a public trial, but would have eliminated the problem of "spill-over" from the inferences to be drawn from the acts of the co-defendants, admissible only as to them, to the issue of guilt of or innocence of the defendant Moreno.

Defense counsel was placed in a situation where he was not only concerned with the spill-over effect, a concern shared by the Trial Court (T. 1189), but he was unprepared, by virtue of his exclusion from the hearings, to face and counteract that problem.

Unaware of the nature, content and substance of the evidence to be introduced concerning similar acts committed and statements made by Moreno's co-defendants, counsel was unable to discern the manner in which he could best separate his client in the minds of the jury, from the other defendants. Additionally, and possibly more importantly, counsel was unaware of the extent of the witnesses' knowledge of the actions and conduct of Moreno. For instance, part of the testimony elicited at the hearings from which counsel was excluded, may have contained matter tending to exculpate Moreno. Counsel, having been excluded from the hearing, had no way of knowing if such testimony existed, and how, therefore, to make best use of it on behalf of his client.

In Clark, supra, this Court held that total exclusion of defendants and the public from the courtroom during suppression hearings was violative of these Sixth Amendment rights. Responding to the argument that such exclusion was necessary for protection of the secrecy of the description of the "hijacker profile", the Court held that such exclusion of a defendant from his trial must be for a strictly limited time and only so long as is absolutely necessary for the purpose of security. United States v. Clark, supra at 246.

It is abundantly clear from the record of the proceedings below that the secret proceedings were of greater scope and length than absolutely necessary. First of all, there was no reason why the attorneys had to be excluded from the proceedings; an appropriate admonition by the Court that they not reveal certain matter to their clients would have been sufficient to avoid any danger. In fact, Moreno's counsel suggested to the Court:

"Obviously counsel's effective manner of cross examination can only be determined by what he knows about the case. Your Honor's concern was the safety of the defendants and not to disrupt the proceedings. I respectfully submit that could have been satisfied by at least having counsel present at these matters with an instruction that whatever was learned at these matters was not to be transmitted to any of our clients.

"Instead, we were just kept in the dark about what was happening in these in camera proceedings throughout the trial up until this very moment.

"So I cannot speak with any certainty as to how I could have used such information to my advantage so I am to this moment ignorant of that information."

(T. 2072-73)

Secondly, there was no reason for exclusion of Moreno from the proceedings. He had not been involved in

the isolated altercation on the first day of trial, and there was no evidence that he either counselled, abetted or aided in the attack by Wilson Arroyo upon Ahon. In fact, Moreno conducted himself in a judicious and respectful manner at every moment of this long trial.

The fact that the persons who testified at the secret proceedings testified in open court at a later time does not cure the error herein. Rejecting such an argument in Clark, the Second Circuit stated that it "cannot treat the matter of appellant's constitutional right of confrontation so cavalierly." Id. at 245. The right of confrontation extends to pre-trial suppression hearings, United States v. Clark, supra, when the trial judge gives additional instructions to the jury, Evans v. United States, 284 F.2d 393 (6th Cir. 1960), and should, naturally, apply to the proceeding herein from which the defendant Moreno and his counsel were excluded.

The extent of the prejudice resulting from exclusion of defendant and his counsel from the hearings is epitomized by the statement of Mr. Curley, counsel for co-defendant Wilson Arroyo. On June 17, 1977, he pointed out

to the Court:

"it pertains to co-counsel's being kept in the dark about certain matters.

"The trial transcript on page 1432 refers to observations by Agent Fiorentino on December 4, 1975 of my client near Pier 50 and either I didn't hear correctly, there was no significance attached to it which is a problem and that would mean nothing to co-counsel. They know, however, that my client testified before a grand jury in Baltimore because that point was made in open court.

"I didn't mention the date, as I recall December 3rd, so we have a factual situation of my client being in Baltimore some time on the date of December 3rd and being in San Francisco and conducting activities in reference to this case the next day...

"It is quite possible that the date in California is correct, my client was participating in illegal activities a few hours after getting off the plane after testifying before a grand jury in Baltimore. I suspect that co-counsel might want to develop that had they known about the Baltimore date.

"Since they were not aware of it until I guess right now, I think the problem warrants discussion. We had motions for a severance and Mr. Leitel has complained about the secret proceedings and now we see one....

"THE COURT: I have done it only for the safety of the human beings involved. I have not in any way tried to

cut back on anything and it is a terrible problem. I recognize the problem.

"MR. CURLEY: I have no fault with the Court procedures, I am just aware that defense counsel, co-counsel in the case, had they been aware of the Baltimore date may or may not have chosen to exploit it. The likelihood, or, even the time element of his being back in San Francisco acting in such a fashion and I don't know what I would have done with it. I clearly think I would have waived the opportunity but I don't know that that could be said of co-counsel."

(T. 2067-2070)

Later, during the same discussion, Mr. Curley continued:

"I am raising the question, they couldn't raise it because they didn't know about it unless I raise it.

"THE COURT: I understand. I think it is appropriate to protect the record."

(T. 2072)

This is but one example of the type of information which would have been available to counsel for defendant to use on cross-examination, had he been allowed to be present during these secret proceedings. The exclusion of defense counsel and defendant from these proceedings, without

sufficient reason therefor, violated the defendants Sixth Amendment rights to confrontation of witnesses, effective assistance of counsel and a public trial.

POINT II: PURSUANT TO RULE 28(i) OF THE
FEDERAL RULES OF APPELLATE
PROCEDURE, APPELLANT MORENO
RESPECTFULLY ADOPTS BY REFERENCE
SUCH OF THE POINTS OF HIS CO-
APPELLANTS AS ARE APPLICABLE TO
HIM.

V. CONCLUSION

Errors of the genre which occurred in the trial herein, because of their infringement upon essential and fundamental constitutional rights, have been held to be errors per se, requiring reversal of the conviction. United States v. Clark, supra. Therefore, Moreno is entitled to a new trial.

Dated: Brooklyn, New York
November 18, 1977

Respectfully submitted,

IRA LEITEL
Attorney for GUILLERMO MORENO
Office & P.O. Address
188 Montague Street
Brooklyn, New York 11201
(212) 596 - 1600

CAROL MELLOR, ESQ., On the Brief